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IN THE

Supreme Court of the United States

October Term, 1964.

No. [redacted] 78

ATLANTIC & GULF STEVEDORES, INC.,
Petitioner,

v.

ELLERMAN LINES, LTD.,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1964.

No. 1087.

ATLANTIC & GULF STEVEDORES, INC.,
Petitioner,

v.

ELLERMAN LINES, LTD.,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION.

Respondent does not dispute petitioner's statement of the "Opinions Below" and "Jurisdiction". However, respondent finds it necessary to state its own view of the question presented and to supplement and correct certain statements made in petitioner's "Statement of the Case". Respondent also believes that a statute is involved.

QUESTION PRESENTED.

Where a shipowner sued a stevedore contractor in admiralty for indemnity, alleging that the stevedore's breach of its contractual obligation to the shipowner had caused the shipowner to incur losses and expenses and that the shipowner will be compelled to incur further expenses and may be compelled to pay a judgment in favor of an injured longshoreman, did not the libel state a cause of action within the admiralty jurisdiction?

STATUTE INVOLVED.

28 U. S. C. § 1333 provides in relevant part:

"The district courts shall have original jurisdiction, exclusive of the courts of the States, of:

"(1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled. . . ."

Act of June 25, 1948, c. 646, 62 Stat. 931, amended May 24, 1949, c. 139, § 79, 63 Stat. 101.

STATEMENT OF THE CASE.

Petitioner's statement does not disclose the nature of the claim asserted in respondent's libel, which must be clearly understood at the outset.

Respondent did not seek recovery from petitioner for the injury caused to petitioner's employee, Eckles. Rather, respondent's libel sought recovery for the losses and damages caused to respondent by petitioner's breach of its contractual duty to perform its services in a competent and workmanlike manner.

Specifically, respondent alleged that as a result of Eckles' injuries, respondent had been compelled to expend money in the investigation and defense of Eckles' suit; that respondent would in the future incur further similar expenses, and might ultimately be compelled to pay a judgment in Eckles' favor (Libel, par. 8). It was for these items of loss and damage that respondent sought recovery from petitioner.

Petitioner states that ". . . Respondent recognized that no contractual obligation was specifically undertaken. It relied instead upon an implied obligation extrinsic to the contract between the parties" (Petition, p. 5).

This statement of respondent's position is inaccurate or, at least, highly ambiguous. Respondent in fact relied upon an obligation of petitioner which was of the essence of the contract between the parties. In no sense was petitioner's obligation "extrinsic" to the contract.

ARGUMENT.

A. Petitioner Is Not Deprived of a Jury Trial as a Matter of Right.

Petitioner asserts that it has been deprived of a jury trial as a matter of right. This is an extravagant assertion for which there is no support.

Petitioner ignores the fact that 28 U. S. C. § 1333, quoted above, afforded respondent a choice of remedies. Respondent could, and did, bring suit in admiralty. Respondent could also have sued petitioner on the civil side by impleading petitioner in Eckles' civil suit, which petitioner would apparently have preferred. Respondent did not exercise the latter option, and its decision cannot be the basis for complaint.

As recently as *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines,* 369 U. S. 355, this Court reaffirmed that a cause of action such as that here asserted by respondent may be sued upon in admiralty, or on the civil side (at 369 U. S. 359-360).

Ever since *Waring v. Clarke,* 5 How. 441, it has been settled that the Seventh Amendment does not require jury trials in admiralty cases.

In this context, the fact that shipowners have on some past occasions asserted their indemnity rights against stevedore contractors in civil actions, with trial by jury, is irrelevant. Equally irrelevant are the cases cited by petitioner (Petition, p. 8), where the shipowner's rights were adjudicated in civil actions.

The point is that if, as will be conclusively demonstrated, the subject matter of respondent's libel was within the admiralty jurisdiction, petitioner had no right to a jury trial. Petitioner cannot assert the deprivation of a right which never existed.

B. Respondent's Suit in Admiralty Had a Legitimate Purpose and Will Not Result in Needless Multiplicity of Litigation.

Petitioner seizes upon the Court of Appeals' characterization of respondent's suit in admiralty as a "tactical maneuver". If it were such, it is certainly not a "maneuver" deserving condemnation, nor did the Court of Appeals so view it.

The shipowner's indemnity recovery from a stevedore contractor includes reasonable counsel fees and necessary expenses incurred in the defense of the injured longshoreman's suit. *Brown v. San Alberto Cia Armadora, S. A.*, 305 F. 2d 602 (C. A. 3, 1962); *Paliaga v. Luckenbach S. S. Co.*, 301 F. 2d 403 (C. A. 2, 1962); *Rogers v. United States Lines Company*, 303 F. 2d 295 (C. A. 3, 1962). The recovery includes counsel fees and expenses incurred on appeal. *De Gioia v. United States Lines Company*, 304 F. 2d 421, 426-427 (C. A. 2, 1962); *Massa v. C. A. Venezuelan Navigacion*, 332 F. 2d 779, 782 (C. A. 2, 1964); *Nicroli v. Den Norske Afrika-Og Australielinie, Etc.*, 332 F. 2d 651, 656 (C. A. 2, 1964).

Obviously, fact questions are involved in determining the reasonableness of counsel fees and the necessity for defense expenditures, and in liquidating these items. It seems to respondent incongruous to have such issues determined by a jury. Conversely, it would be difficult to conceive of a set of issues more appropriately determinable by the Court, as can be accomplished in an admiralty action.

Moreover, it would by definition be impossible for any jury, at the trial of the injured longshoreman's suit against the shipowner, to assess the reasonable value of the shipowner's counsel fees and expenses which had not yet accrued, including those which might accrue on appeal and in other post-trial proceedings. Again these are matters

peculiarly appropriate for the Court's ultimate determination.

The foregoing are certainly legitimate considerations in determining respondent's choice of its remedy.

Needless multiplicity of litigation is not involved in respondent's suit in admiralty in any realistic sense. As the Court of Appeals suggested, sound judicial administration would militate for consolidation of the present proceeding with Eckles' civil suit against respondent. Certainly there is no legal impediment to this procedure. If it were followed, the end result would be no greater burden upon the Court or the parties than if respondent had elected to sue petitioner via a third-party complaint in Eckles' pending civil suit.

C. Respondent's Action Was Not Premature. The Decision Below Is Perfectly Consistent With the Doctrine of Indemnity Enunciated by This Court, and With Other Appellate Decisions.

Petitioner asserts that the concept of indemnity enunciated by this Court in *Ryan Stevedoring Co. v. Pan-Atlantic S. S. Corp.*, 350 U. S. 124, was one of indemnity against "liability" as opposed to indemnity against "loss or damage". According to petitioner, this means that respondent has no right of indemnity until it be held liable to Eckles, the injured longshoreman. Therefore, petitioner argues, the present action is premature since respondent's liability to Eckles has not as yet been adjudicated.

This line of reasoning starts from an incorrect major premise. Neither this Court, nor any other appellate court, has ever held or intimated that the stevedore contractor's obligation to indemnify the shipowner is limited to indemnification against liability, as distinguished from indemnification against loss or damage. Actually, this Court held in *Ryan* that the stevedore's obligation *is* to indemnify against damage.

In *Ryan*, this Court defined the stevedore contractor's assumption of responsibility to the shipowner to include "the discharge of foreseeable *damages* resulting to the shipowner from the contractor's improper performance . . ." (at 350 U. S. 129, footnote 3; emphasis supplied).

In *Weyerhaeuser S. S. Co. v. Nacirema Operating Co.*, 355 U. S. 563, the same language was used to describe the scope of the stevedore's indemnification liability (at 355 U. S. 565).

In *Crumady v. The Joachim Hendrik Fisser*, 358 U. S. 423, this Court restated the *Ryan* doctrine to mean that a shipowner is "entitled to indemnification for all *damages* it sustained as a result of the stevedoring company's breach of its warranty of workmanlike service" (at 358 U. S. 428; emphasis supplied). Similar language was used to define the nature of the stevedore's obligation in *Waterman S. S. Corp. v. Dugan & McNamara, Inc.*, 364 U. S. 421, 423.

In the face of these clear pronouncements, it cannot be contended that the stevedore's indemnification obligation extends merely to liability, as distinguished from loss or damage. This Court has already spoken conclusively to the contrary.

Moreover, if petitioner were correct that it has no obligation to indemnify respondent until Eckles has obtained a judgment against respondent, this would obviously negate, for instance, any indemnification liability in cases where the injured longshoreman's suit against the shipowner has been concluded via settlement. *Waterman S. S. Corp. v. Dugan & McNamara, Inc., supra;* see, also, *Paliaga v. Luckenbach S. S. Co., supra.*

Finally, petitioner's argument is contrary to the uniform body of appellate authority which recognizes that the stevedore's obligation is exactly what this Court has said it is—that is, an obligation to indemnify the shipowner against loss or damage, rather than against liability only.

This principle is illustrated by cases holding that where the shipowner successfully defends against the injured long-

shoreman's suit, it can nevertheless recover its costs and expenses involved in the effort if the occasion for them was a breach by the stevedore of its warranty of workmanlike service. *Strachan Shipping Co. v. Koninklyke Nederlandsche S. M., N. V.*, 324 F. 2d 746 (C. A. 5, 1963), cert. denied 376 U. S. 954; *Guarracino v. Luckenbach S. S. Co.*, 333 F. 2d 646 (C. A. 2, 1964); *Massa v. C. A. Venezuelan Navigacion, supra.*

The present libel alleged damage already sustained by respondent in the form of expenses already incurred in the investigation and defense of Eckles' claim. It also alleged that the damage resulted from petitioner's breach of its contractual obligation to respondent. Thus the essential elements of a present cause of action clearly appear.

The fact that petitioner's breach of its contractual obligation has not been proved is immaterial. This, as the Court of Appeals correctly observed, is a matter for subsequent proof under the adequate allegations of the libel. Nor is it material that some of the items of damages alleged in the libel (such as future losses) are not as yet liquidated. It is well established that damages need not be liquidated before a cause of action can arise. *United States v. Atlantic Mutual Insurance Co.*, 298 U. S. 483; see, also, *Unexcelled Chemical Corporation v. United States*, 345 U. S. 59, 65.

It is therefore clear that respondent's libel stated a cause of action for indemnity upon principles announced and consistently approved by this Court, and that the libel was not premature.

D. Petitioner's Obligation to Indemnify Respondent Arises From a Maritime Contract. Accordingly, Respondent's Indemnity Action Is Within the Admiralty Jurisdiction.

The remaining points raised by petitioner can be conveniently discussed under one heading, since they are in many respects interrelated.

Petitioner urges that because the contract between the parties did not contain any express provision requiring petitioner to indemnify respondent with respect to personal injuries, there is no contractual basis for respondent's suit. It is further asserted that in any event, petitioner's indemnification liability does not arise from a maritime contract, and accordingly there is no admiralty jurisdiction of respondent's libel.

These propositions are demonstrably unsound, and amount to a bald denial of the settled law.

Ryan Stevedoring Co. v. Pan-Atlantic S. S. Corp., supra, established conclusively that the stevedore contractor's obligation to indemnify the shipowner for breach of the former's warranty of workmanlike service is implied in the contract. The obligation exists irrespective of the absence of an express provision requiring the stevedore to indemnify with respect to personal injuries. This Court described the stevedore's warranty of workmanlike service as "of the essence" of the stevedoring contract (at 350 U. S. 133). How it can be argued that an action based upon breach of that warranty has no contractual basis defies understanding.

That the shipowner's action for indemnity is based upon the stevedore's contractual undertaking has been consistently reiterated in every case which has followed *Ryan,* including *Weyerhaeuser, Crumady* and *Waterman, supra,* not to mention a host of lower court decisions.

Nor can there be any doubt that a shipowner's action for indemnity based upon the stevedore's breach of its warranty of workmanlike service is within the admiralty jurisdiction. In *American Stevedores, Inc. v. Porello,* 330 U. S. 446, this Court held that a stevedoring contract is a maritime contract within the admiralty jurisdiction, and that the indemnity features of the contract were inseparable.

Proof positive of the infirmity of petitioner's position is the fact that in *Ryan* and its progeny, this Court enun-

dated the rules of decision governing a shipowner's claim for indemnity against a stevedore contractor. If the subject matter were not within the admiralty jurisdiction, this could not have been accomplished. It is the existence of admiralty jurisdiction, and nothing else, which empowers the Federal Courts to draw on the substantive law inherent in that jurisdiction and to continue its development. *Romero v. International Terminal Operating Co.*, 358 U. S. 354, 360-361; *Crowell v. Benson*, 285 U. S. 22, 55. See, also, *Crumady, supra*, in which the indemnity issues, inter alia, were decided in an admiralty proceeding; and *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, supra*, in which this Court stated that the shipowner's indemnity action could be brought in admiralty (at 369 U. S. 359).

CONCLUSION.

The decision of the Court of Appeals is in all respects consistent with the settled law. In no sense is it in conflict with any decision of this Court, or any other Court of Appeals. Accordingly, respondent respectfully urges that the petition for certiorari be denied.

Respectfully submitted,

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